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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1396

MICHELIN TIRE CORPORATION,
Petitioner,

vs.

W. L. WAGES, Tax Commissioner, et al.,
Respondents.

RESPONDENTS' BRIEF

In Opposition to Petition for a Writ of Certiorari to the Supreme Court of Georgia

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STATEMENT OF THE CASE

In addition to the recitals made by Petitioners it should be noted, [and as carefully pointed out in the decision of the Supreme Court of Georgia], that after the tires arrive at Petitioner's warehouse in Gwinnett County, Georgia, as to the sea vans and over-the-road trailers into which the tires were packed and sealed at the foreign factories

". . . each trailer or van load is unloaded and sorted so that the individual shipments are no longer separate

identifiable units. The tires are stacked on wooden pallets and stand in the warehouse, segregated by size and style, awaiting sale to retail dealers. The individual tires are not treated or altered in any manner.

* * * * * * * *

"All the tires and tubes in the Gwinnett warehouse are sold to franchised Michelin dealers in six southeastern states. There are 250 to 300 such dealers who submit their orders, and Michelin makes delivery by common carrier or on *a customer pickup basis. The orders* vary in size and *may be filled from any shipment from the manufacturer and from any pallet or carton,* depending upon the size and style ordered. No tires are sold directly to retail customers." [Emphasis supplied.]

QUESTION PRESENTED

Whether tires imported by Petitioner in bulk and without packaging, but which after arrival at its warehouse have been sorted and segregated as to size and style and stacked on wooden pallets with other tires in its warehouse so that the individual shipments are no longer separate and identifiable units, are nonetheless immune from local ad valorem taxes by reason of Article I, Section 10, Clause 2 of the Constitution of the United States?

REASONS FOR DENYING THE WRIT

I. The decision of the Supreme Court of Georgia is in accord with applicable decisions of this Court, and is supported by this Court's holding in *F. May & Co. v. New Orleans* (1900), 178 U.S. 496, 44 L.Ed. 1165, which clarified the earlier decision in *Brown v. Maryland* (1827), 25 U.S. [12 Wheat.] 419, 6 L.Ed. 678.

II. Any seeming conflicts in the holdings of the several State courts of last resort are predicated upon differing factual situations which must be resolved on an individual basis.

These will be discussed seriatim.

I

The Decision of the Supreme Court of Georgia Accords With Applicable Decisions of This Court.

In *Hooven & Allison Co. v. Evatt* (1945), 324 U.S. 652, 89 L.Ed. 1264, with respect to the immunity afforded imported goods by the Import Clause of the Constitution this Honorable Court held

> ". . . that immunity survives their arrival in this country and continues until they are [1] sold, [2] removed from the original package, or [3] put to the use for which they are imported. (cits.)" [Brackets supplied].

The decision of the Supreme Court of Georgia [Petition A-17] properly applies the foregoing to the facts here involved. We quote:

> "In the case at bar the entire Michelin tire inventory was unpackaged, and all shipments in the inventory were co-

mingled and stored by size and type to make the individual units immediately available for resale. We therefore hold that the tires, imported in bulk without packaging, which have been sorted, segregated by size and style, and co-mingled with other shipments have lost their status as 'imports' and are subject to taxation."

(a)

The original package test applies to bulk shipments

Whether the sea van and over-the-road containers are properly considered the "original package", as in *Volkswagen Pacific, Inc. v. City of Los Angeles,* 101 Cal. Rptr. 869, 496 P.2d 1237,[1] or a normal means of transportation available through common carriers as was done by the Supreme Court of Georgia in the instant case, is not of critical significance.

An early definition of "original package", and one which has been accepted by text writers[2] and the Courts[3] alike, was announced by the Supreme Court of Tennessee in *Austin v. State* (1898), 101 Tenn. 563, 575, 48 S.W. 305, 308 [affirmed 179 U.S. 343, 45 L.Ed. 224]

> "Speaking generally, we would say that an original package, as applied to interstate and international commerce, is a package, bundle or *aggregation of goods*, put up, in whatever form, covering, or receptacle, for transportation, and

[1] Substantial support exists for this view. *Texas Company v. Brown* (1922), 258 U.S. 466, 66 L.Ed. 721; *Mexican Petroleum Corporation v. City of South Portland,* 121 Me. 128, 115 A. 900, 26 ALR 965. *Annotation*: 26 ALR 971.

[2] *26 Am Jur 2d, Commerce §§ 45, 46; 15 CJS Commerce,* § 28, p. 493.

[3] *West Virginia & Maryland Gas Co. v. Towers,* 106 A. 265, 134 Md. 137.

> as a unit transported from one state or nation to another." [Emphasis supplied.]

In *F. May & Co. v. New Orleans* (1900), 178 U.S. 496, 44 L.Ed. 1165, this Honorable Court considered goods imported in boxes, cases or bales, and which had been removed therefrom. Said the Court:

> "Without further reference to authorities we state our conclusion to be that within the decision in *Brown v. Maryland* the boxes, cases or bales in which plaintiffs' goods were shipped were the original packages, and the goods imported by them lost their distinctive character as imports and became a part of the general mass of the property of Louisiana, and subject to local taxation as other property in that state, *the moment the boxes, cases, or bales in which they were shipped reached their destination for use or trade* and were opened and the separate packages therein exposed or offered for sale; consequently, the assessment in question was not in violation of the Constitution of the United States." [Emphasis supplied.]

Other language appearing in the decision clearly indicates the same result would have been reached had the individual items been removed from an "aggregation of goods." We quote (p. 508):

> "We have seen that the plaintiffs, in effect, contend that having paid the duties imposed by the United States they were entitled, without liability to taxation upon the goods as property, to open the boxes in which the separate parcels of goods were transported, and put such separate parcels in the hands of agents to be sold wherever, in the state or in the country, customers could be found. The separate parcels—such is the effect of the argument—are not to be deemed incorporated into the mass of the property of the state while thus being carried around the country by the

importer's agents,—no separate parcel, so long as it remained *in the particular form* in which it was packed in a box or case with other parcels, ceasing to have the character of an import until after it was sold by such agents. This proposition cannot be sustained. We cannot doubt that the goods when placed in the hands of agents for sale, *in separate parcels*, have been so acted upon by the importer that they have ceased to be imports, and have become part of the mass of the property of the state, liable to local taxation. But what is the difference in principle between the case of sales by an importer through traveling agents, and the case of an importer who opens the box or case in which his goods, wrapped in separate parcels, were imported, and by employees sells or offers to sell the separate parcels, either from the opened box or case in his store, or from shelves or counters upon which such parcels have been placed for examination and sale?" [Emphasis supplied.][4]

Petitioner's reliance upon the words "original form," appearing in *Brown v. Maryland*, supra, seems misplaced. The "original form" of some articles of commerce never changes. As noted in *E. J. Stanton & Sons v. Los Angeles County*, 78 Cal App 2d 181, 177 P.2d 804, cer den 322 U.S. 766, 92 L.Ed. 352, (p. 807):

> "Indeed such articles of commerce as steel beams, threshing machines, telegraph poles and many others might be cited as illustrative of classes of imports that are incapable of being wrapped in cellophane or encased in wooden or steel crates. Although they might arrive at the dock without cover, nevertheless a shipment of such articles constitutes the original form or the original package."

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[4] Other decisions of this Honorable Court holding in accord are *Cook v. Marshall County*, 196 U.S. 261, 49 L.Ed. 471; *Purity Extract and Tonic Company v. Lynch*, 226 U.S. 192; 57 L.Ed. 184; *Price v. Illinois*, 238 U.S. 446, 59 L.Ed. 343.

While Petitioner's tires are capable of being wrapped or otherwise encased, the fact that they are not so done should not afford an immunity from local taxation. In short being circumferential in form and shape, the tires will retain this characteristic throughout their entire useful life.

II

Any Conflicts in State Court Decisions Result From Factual Determinations and Not From Failure to Recognize Legal Principles.

Reverting to *Brown v. Maryland*, supra, in the course of the opinion Chief Justice Marshall stated (p. 441):

> "The constitutional prohibition on the states to lay a duty on imports—a prohibition which a vast majority of them must feel an interest in preserving—may certainly come in conflict with their acknowledged power to tax persons and property within their territory. The power, and the restriction on it, though quite distinguishable when they do not approach each other, may yet, like the intervening colors between white and black, approach so nearly as to perplex the understanding, as colors perplex the vision in marking the distinction between them. Yet the distinction exists, and must be marked as the cases arise. Till they do arise, it might be premature to state any rule as being universal in its application. It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on

imports to escape the prohibition in the constitution." pp. 442, 443.

The seeming conflict, if indeed conflict there be, between decisions of State Courts of last resort stem from differing factual situations and findings of fact made as to activity of the importers with reference to the particular goods involved. Without particular exception all such decisions refer to *Brown v. Maryland*, supra, as well as other decisions of this Honorable Court.

For example, in *E.J. Stanton & Sons v. Los Angeles County*, 78 Cal App 2d 181, 177 P.2d 804, cer den 332 U.S. 766, 92 L.Ed. 352, supra, the California Appeals Court pinpointed the issue for decision thus:

> "The question involved is whether respondent as importer had so treated certain taxed lumber as to incorporate it into the mass of property in this state thereby removing it from the inhibition of the federal constitution against a state's assessing duties on imports."

Whether the phraseology utilized in the opinion "surrounded by the invisible gossamer woven of law, custom and convention" is so much rhetoric and subject to the criticism leveled against it by Petitioner, it nonetheless squares with this Honorable Court's statement in *F. May & Company v. New Orleans*, supra, that imported goods become subject to local taxation "the *moment* the boxes, cases, or bales in which they were shipped reached their destination for use or trade, . . ." [Emphasis supplied.]

A mere casual reading of *American Mannex Corporation v. Cronvich*, 251 La. 1014, 207 So.2d 778, reveals that commingling of steel casings was involved, and the case went off on its particular facts.

Florida Greenheart Corporation v. Gautier, 172 So.2d 589, cer den 382 U.S. 825, 15 L.Ed. 2d 70, was by a divided court the cleavage in thought resulting from differing views of the facts

presented. The majority equated the facts with an earlier decision of the Florida Court involving canned meats imported from Europe and stored in the original unbroken cases, *Overstreet v. Frederick B. Cooper Co.*, 134 So. 2d 225.[5] The dissenting judges viewed the factual situation in different perspective.

Citroen Cars Corporation v. City of New York, 30 N.Y. 2d 300, 283 N.E.2d 758, is also a factually oriented decision since the opinion discloses, as in the instant case, a portion of the inventory was determined to be taxable. The following statement is significant (p. 761):

> "As with the original package doctrine a line must be drawn, sometimes arbitrarily, beyond which the immunity will not extend. (cit)"

The same is true of *Columbus Steel Supply Co. v. Kosydar*, 38 Ohio St 2d 258, 313 N.E.2d 389, not cited by Petitioner. Steel pipe purchased from foreign suppliers was assessed for local taxation. Upon arrival at the storage yard the pipe was hoisted from the transport vehicles by means of a crane, placed on skids, and sorted according to outside-diameter size, wall thickness, and whether plain or threaded-and-coupled ends.

After reviewing *Brown v. Maryland*, supra, *F. May & Co. v. New Orleans*, supra, and *Austin v. State*, supra, the Court stated most significantly (p. 393):

> "We conclude, therefore, that the 'original package' involved in this case was the commercial unit of importation. Applying that principle to the facts of this case, it is our opinion that each item of pipe which arrived in a shipment was an integral part of the aggregate which composed the commercial unit, and that when an item of pipe was separated from the commercial unit, or was sorted or segregated

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[5] The *Overstreet case* obviously involved facts exactly parallel to those in *Low v. Austin* (1871), 80 U.S. (13 Wall.) 29, 20 L.Ed. 517, and therefore of ready solution.

from other items comprising the commercial unit, the original package was broken or 'opened'.

We recognize that the case law which embodies the original package doctrine has established a general focus of inquiry which, in the final analysis, requires an evidentiary determination that the actions of the importer upon the imported items caused a cessation of the tax immunity." [Emphasis supplied.]

Review by writ of certiorari has been declined in at least three instances and, while Respondents freely acknowledge such denial is not stare decisis, the grant of certiorari in the instant case will not achieve the result argued for by Petitioner. Activities of importers are complex, the goods imported are varied in physical characteristics, the handling of same by the importers after their arrival are lacking in uniformity and of necessity will continue so. The statement of Mr. Chief Justice Marshall in *Brown v. Maryland*, supra, is no less true today than when originally uttered:

". . . the distinction exists, and must be marked as the cases arise. Till they do arise, it might be premature to state any rule as being universal in its application."

Respondents respectfully submit the Petition for a Writ of Certiorari in this case should be denied.

Respectfully submitted

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